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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS,

Cross Petitioner,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, et al.

On Writs of Certiorari to The United States Court of Appeals For the First Circuit

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BRIEF OF AMICI CURIAE VICTORIA GRIMESY, LISA M. MAYO, ERIKA SMITH, LUCY RICO, MICHELLE BOLES, GINA MOSQUEDA, CENTER ON LAW AND SOCIAL POLICY, MICHIGAN LEGAL SERVICES, NATIONAL HEALTH LAW PROGRAM, NATIONAL HOUSING LAW PROJECT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL SENIOR CITIZENS LAW CENTER, SOLANO COUNTY LEGAL ASSISTANCE, IN SUPPORT OF THE COMMONWEALTH OF MASSACHUSETTS

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INTEREST OF THE AMICI

In the pending case, the Court is being asked to decide whether the Tucker Act prevents a district court from exercising jurisdiction over a state's action challenging a disallowance of funds in the Medicaid Program. The resolution of this issue will have profound importance for other Social Security Act litigation, and may affect access to the district courts and regional courts of appeals in many other areas of law.

Disallowance litigation is only one type of litigation affecting administration of the grant-in-aid programs under the Social Security Act. The other major type of litigation occurs when program beneficiaries sue a state for alleged violations of the Act. In such instances, the state often files a third party complaint against the federal government, alleging that if the state is liable to program beneficiaries, the federal government should be

obligated to provide federal financial participation in the state's costs. The disposition of Bowen v. Massachusetts may have a critical effect on such third party complaint litigation.

Amici include the plaintiffs in Grimesy v. McMahon v. Bowen, currently pending before the Federal Circuit Court of Appeals (Case No. 87-1228) and before the Ninth Circuit Court of Appeals (Case No. 87-1745). As more fully set forth below, the Grimesy litigation offers an example of the implications of HHS' Tucker Act jurisdictional arguments when applied to third party complaint litigation. HHS has argued in Grimesy that when a class of welfare recipients sues state officials for prospective relief and back benefits, and the state files a third party complaint against HHS, the third party complaint arises in part under the Tucker Act and may only be heard in the United States Claims Court. Relief for plaintiffs in Grimesy has been

stayed pending resolution of this jurisdictional issue.

Amici believe that the Grimesy litigation helps illustrate some of the problems that would result if HHS' Tucker Act jurisdictional argument were accepted in this case. Applying HHS' jurisdictional argument to third party complaint litigation would lead to duplicative litigation in multiple forums, and could cause chaotic dispositions of issues arising under the Social Security Act.

In addition to the Grimesy plaintiffs, amici include legal services organizations and public interest law offices who represent indigent clients in issues concerning federal grant-in-aid programs, federal housing programs, and other federally funded programs for the poor.

Amici have an interest in this case because the result may affect Social Security Act litigation whenever beneficiaries sue a state and the state initiates a

third party complaint against HHS. Amici believe the position being urged by HHS would result in countless procedural problems for Social Security Act and related litigation.

Amici also fear that the expansive view of the Tucker Act urged by HHS could adversely affect access to the federal courts in other areas affecting the poor. HHS' Tucker Act argument, if accepted, would shift much of the nation's litigation on the rights of beneficiaries and states in federal grant-in-aid programs to the United States Claims Court and the Federal Circuit Court of Appeals. This would create a morass of procedural and substantive problems. Amici wish to suggest some of the most troublesome ramifications of the position espoused by HHS.

SUMMARY OF ARGUMENT

The broad construction of the Tucker Act being urged by the United States raises serious problems in contexts other than

Medicaid disallowances.

The implications of the broad construction are illustrated by Social Security third part complaint litigation. This is litigation where beneficiaries sue a state for violation of the Social Security Act, and the state files a third party complaint against HHS. The third party complaint typically seeks to insure federal financial participation in the costs of any orders issued by the court in the underlying litigation.

In Grimesy v. McMahon, now pending before the Federal and Ninth Circuits, HHS contends that a state's third party complaint in such a case arises in part under the Tucker Act. This contention is inconsistent with established Tucker Act precedent. A Tucker Act claim based on a federal statute must seek a money judgment based on a statute that mandates compensation for damages sustained. United States v. Mitchell, 463 U.S. 206, 216-17

(1983). A state's third party complaint alleges no wrongful withholding of funds, and no wrongful conduct for which the state is entitled to "compensation" for "damages sustained." Moreover, a Tucker Act claim must be for "actual, presently due money damages", United States v. King, 395 U.S. 1, 3 (1968), based on the past acts of the federal government. United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 2234 (1986). A state's third party complaint cannot allege an entitlement to any actual, presently due amount, and cannot allege entitlement based on any past acts of the United States.

If the Tucker Act were broadly construed to divest district courts of jurisdiction over state third party complaints in Social Security litigation, there would be two major undesirable consequences. First, such a result would ensure bifurcation of cases, since the Claims Court could not exercise jurisdiction over the case

between beneficiaries and the state. The bifurcation would create inefficiency, confusion, and potential chaos at both the trial and appellate stages.

Second, such a result would shift much Social Security Act litigation to the Claims Court and Federal Circuit Court of Appeals. Neither court has expertise in Social Security Act litigation. There is no evidence of Congressional intent to shift such cases to these courts. It would be difficult for low income beneficiaries to regularly litigate in Washington. It would be inappropriate to shift the frequently controversial litigation brought by indigent claimants to a trial court lacking the protections of the Article III judiciary. If the Federal Circuit were made a de facto national court of appeals for Social Security Act litigation, there would be increased burdens on both that and this court.

Finally, the government has recently

made an even more expansive Tucker Act jurisdictional argument in the context of federal housing programs. The United States has suggested that an action for declaratory and injunctive relief arises under the Tucker Act when it has financial consequences, even when the plaintiffs do not seek money. Thomas v. Pierce, 662 F. Supp. 519 (D. Kan. 1987) appeal pending, No. 87-2121 (10th Cir. 1988). This argument, if accepted, could convert virtually any case in which program beneficiaries allege illegal conduct by the United States into a Tucker Act action. The Court should reject this major alteration of jurisdiction in the federal courts.

I. The Tucker Act does not divest a District Court from exercising jurisdiction over a state's third party complaint seeking federal financial participation for costs arising in an underlying action between beneficiaries and the state.

Apart from disallowance cases, there

is another major area of litigation concerning grant-in-aid programs under the Social Security Act. This other category arises when program beneficiaries sue a state for alleged violation of the Social Security Act. In such cases, the states often file a third party complaint against HHS, alleging that has been following the directives of HHS, and that if the state practice violates federal law, so do HHS' directives. Typically, the state seeks injunctive relief to prohibit HHS from sanctioning the state for compliance with court orders, and to require HHS to provide federal financial participation in the cost of compliance with the court's order.

Amici believe this category of cases is distinguishable from disallowance litigation. Even if this Court holds that the Claims Court has exclusive jurisdiction over disallowance cases, the Court could still make clear that state claims in third party complaint litigation do not arise

under the Tucker Act. Alternatively, the Court could reserve the issue for another day. However, amici fear that an expansive construction of the Tucker Act here could encourage lower courts to find the Tucker Act precludes district court jurisdiction over third party complaints in these cases.

However the Court decides this case, there are considerations in both Tucker Act jurisprudence and in the practical realities governing Social Security Act litigation that should lead to a holding that district court jurisdiction in these third party complaint cases is not limited by the Tucker Act.

In the following section, amici will describe the facts of Grimesy v. McMahon v. Bowen, an example of such third party complaint litigation. They will then explain both why this category is distinguishable from disallowance litigation, and why an expansive construction of the Tucker Act in the disallowance context could cause

severe damage in third party complaint litigation. The difficulties posed by applying an expansive view of Tucker Act jurisdiction in third party complaint litigation help to demonstrate some of the disturbing implications of HHS' arguments in this case.

A. Course of Events in Grimesy v. McMahon v. Bowen

The Grimesy litigation[1] began when AFDC Program beneficiaries sued California officials for injunctive relief and back benefits based on an illegal program practice.[2] J.A. at 23. Plaintiffs filed

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[1] The following description is based on the pleadings and orders, as they appear in the Joint Appendix ("J.A.") on file in Federal Circuit No. 87-1228.

[2] AFDC is a cooperative federal state program of assistance to families with needy children, pursuant to Title IV-A of the Social Security Act, 42 U.S.C. §601 et seq.

The legal issue in Grimesy concerned counting of income in AFDC. California, when determining AFDC eligibility and benefits for families in which the parent was between the age of 18 and 19, "deemed

(continued...)

suit in state court. The state removed the case to the United States District Court for the Northern District of California. J.A. at 18. Since the state engaged in its practice at the direction of the Secretary of Health and Human Services (HHS), the state filed a third party complaint against HHS. J.A. at 85-87. The third party complaint alleged that AFDC is a cooperative federal-state program and that the state is entitled to receive federal

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[2](...continued)
available" the income of the parents of the 18 year old parent, regardless of whether the parent was still in school. Plaintiffs contended that deeming of grandparent income when an eighteen year old parent was not in school or not expected to graduate by age nineteen violated both the Social Security Act, 42 U.S.C. §602(a)(39), and state law. The district court, and every court that addressed the issue concluded that the challenged practice violated federal law. See J.A. at 90-94; Kali v. Heckler, 800 F.2d 971 (9th Cir. 1986); Morrison v. Heckler, 602 F.Supp. 1482 (D.Minn. 1984), aff'd, 787 F.2d 1285 (8th Cir. 1986); Jiminez v. Cohen, No. 85-5285 (E.D. Pa. July 14, 1986); McCarthy v. Heintz, Civ. No. H-85-597 (MJB) (D. Conn. Apr. 23, 1986); Topps v. Bowen, No. 85-NC-0187W (N.D. Utah, Jan. 13, 1986).

financial participation (FFP) for expenditures made pursuant to an approved state plan. The state sought an order providing that if it were liable to plaintiffs, HHS be required to provide FFP for the AFDC program expenses incurred as a result of compliance with the court's order. J.A. at 87. HHS did not object to the district court's jurisdiction.

On June 25, 1986, the district court issued an order holding both the state's practice and the federal regulation on which the state practice was based violated the Social Security Act and were invalid. J.A. at 90-94. The court enjoined the state practice, and enjoined HHS from taking any action whatsoever against the state by way of compliance proceedings, audit disallowance or otherwise because of the state's compliance with the order. J.A. at 93. Both the state and HHS appealed to the United States Court of Appeals for the Ninth Circuit. (Ninth Cir.

Cases No. 86-2403, 86-2559). Each defendant subsequently dismissed their appeal, after the enactment of legislation which barred the practice plaintiffs challenged in the litigation.[3]

On July 23, 1986, the district court issued a subsequent order holding class members were entitled to corrective payments for the benefits lost while the state's unlawful practice was in effect. J.A. at 95-96.

On December 22, 1986, the district court entered an order implementing a procedure for provision of the corrective benefits. J.A. at 1-8. The order included a paragraph enjoining HHS from sanctioning the state for its compliance with the order or denying federal financial participation for the administrative and program costs

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[3] On October 22, 1986, Congress enacted the Tax Reform Act of 1986, P.L. 99-514. The Tax Reform Act amended 42 U.S.C. §602(a)(39) to prohibit any deeming of grandparents' income when an eighteen year old parent seeks AFDC benefits.

incurred in complying with the order. J.A. at 8. The court also issued an order denying HHS' motion to reconsider its orders of June 25 and July 23. J.A. at 9-15.

HHS then filed notices of appeal in both the Federal and Ninth Circuits. It alleged that the part of the state's third party complaint seeking federal financial participation in the cost of retroactive benefits arose under the Tucker Act, and that therefore the state's claim should have been filed in the United States Claims Court. See Fed. Cir. Case No. 87-1228, HHS Substitute Br., at 1-2. HHS contends that the Federal Circuit has exclusive jurisdiction over the question, and that its Ninth Circuit appeal is only protective in nature. HHS Substitute Br., at i. The jurisdictional issues are currently pending before both courts.

To date, HHS has limited its argument to contending that the state's third party

complaint should have been heard in the Claims Court, and appealed to the Federal Circuit. However, HHS has not precluded the possibility of arguing that when a state's third party complaint arises in part under the Tucker Act, the Federal Circuit should exercise exclusive jurisdiction over the entire underlying litigation.[4]

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[4] HHS' Federal Circuit Brief in Grimesy contains this suggestive text:

"This Court has also held that exclusive appellate jurisdiction in the Federal Circuit lies over appeals including non-Tucker Act issues that would have been decided by the regional courts of appeals had they not appeared in the same case as a Tucker Act claim. It is beyond cavil that the plaintiffs' petition for relief from California, as contrasted with the California's third party complaint against the federal government, cannot be construed as coming within the scope of the Tucker Act. Nevertheless, this Court has stated that where the jurisdiction of the district court "was based, in whole or in part" (28 U.S.C. 1295(a)(2)) on a non-tax Tucker Act claim, the entire appeal is within the exclusive jurisdiction of the Federal Circuit, no matter what other claims have been joined with the Tucker Act claim in the complaint. Perhaps, although this Court need not consider that question today, this principle would extend so far

(continued...)

Disposition of Grimesy in the Federal Circuit has been stayed pending resolution of this case; HHS' corresponding request to the Ninth Circuit is pending. See Fed.Cir. Case No. 87-1228, Order, January 19, 1988.

B. A third party complaint seeking to enjoin denial of federal financial participation for costs not yet incurred does not meet the elements of a Tucker Act claim.

Whether or not a disallowance case arises under the Tucker Act, a third party complaint seeking to require the federal government to share in the costs of compliance with a court order is not a claim arising under the Tucker Act.

In United States v. Mitchell, 463 U.S. 206 (1983), this Court restated the test

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[4](...continued)
as to bring within the jurisdiction of this Court non-Tucker Act claims raised by other parties in a multiple party cases, such as this one."

HHS Substitute Br., at 30, n.10 (citations omitted).

for determining whether claims founded on a federal statute are subject to Tucker Act jurisdiction:

> The claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'

463 U.S. at 216-17, quoting United States v. Testan, 424 U.S. 392, 400 (1976) (citations omitted).

A third party complaint seeking to require HHS to share in the cost of compliance with any court orders issued in an underlying action does not meet the Mitchell test. A complaint in such a case does not seek "compensation" and does not allege any right to "damages." It does not allege wrongful withholding of funds, or any wrongful conduct, by HHS. It is a contingent request that if the state is

held liable, the court order HHS to provide federal participation for all AFDC program expenses incurred as a result of compliance with the court's order.

In substance, such a complaint seeks declaratory relief. The state alleges no present injury, since there has been no determination of state liability, and no statement that HHS would refuse to provide federal participation for those costs. The state simply seeks a declaration of rights against HHS in case of state liability. The state does not seek "damages" within any ordinary meaning of the word.

Moreover, "damages for the [federal] Government's past acts" is "the essence of a Tucker Act claim for monetary relief." United States v. Mottaz, 476 U.S. 834, 106 S.Ct. 2224, 2234 (1986) (emphasis added). In the third party complaint, the state does not sue HHS for losses previously incurred by the state. The claim is made before any determination that the state is

seek judicial review and orders as to future Medicaid services are not ones for "money damages," regardless of whether the reviewing court determines the Secretary's future obligation to pay. Sec. Br. 15 n. 11. If that is so, it is also clear that an action for review of an agency decision is not an action for a money judgment or money damages, since it simply determines the correctness of the agency's substantive legal decision, and not the Secretary's monetary liability. Yet the Secretary contends that if reimbursement for past audit periods is involved in a case, that fact transforms the case into a suit for money damages.[13/]

13/ In a similar context, this Court rejected a characterization of reimbursement under the Education for All Handicapped Children Act as "damages." School Committee of the Town of

(footnote continued)

The legislative history of the APA amendments supports the conclusion that Congress did not intend to include actions such as this within the term "money damages." The term "money damages" was added to the APA in the 1976 amendments. The legislative history of the term demonstrates an intent to equate the term with well-known claims for damages which arose in contract and tort actions. See 121 Cong. Rec. 29, 995 (1975)(remarks of Sen. Bumpers); Sovereign Immunity: Hearing on S. 3568, before the Sub Comm. on

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(footnote continued)

Burlington v. Department of Education, 471 U.S. 359, 370-371 (1985). "Reimbursement . . . merely requires "payment of "expenses" that "should have been paid all along." Id. The remedy of reimbursement sought in Burlington was determined by this Court not to be "damages" but a "post hoc determination of financial responsibility." Id. The same characterization applies here.

Administrative Practice and Procedure of the Senate Judic. Comm., 91st. Cong., 2d Sess. (1970) at 18. Indeed, the references to the Tucker Act which appear in the House and Senate Reports on the APA amendments are exclusively concerned with contract claims. H.R. Rep. No. 94-1656 at 5, 12; S. Rep. No. 94-996 at 4, 12.

In labeling the Commonwealth's case as a suit for money damages, the Secretary ultimately would make jurisdiction turn upon the fact that he has already acted to recoup the disputed amounts from subsequent reimbursement. Under the current system of advance funding and retroactive audit and disallowance, the Secretary recoups disallowed funds from future payments. See 42 U.S.C. §§ 1396b(d). Thus the Secretary need not commence an enforcement action to

recover disallowed funds. Compare Bennett v. Kentucky Department of Education, 470 U.S. at 658 (enforcement action). In the absence of preliminary injunctive relief, the Secretary's power to recoup monies from future advances invariably means that a state must pursue litigation after re- coupment takes place. Thus the court of appeals noted that the "structure of the Medicaid program . . . makes it inevitable that disallowance decisions concern money past due." Pet. App. 4a. It is this posture (as a plaintiff pursuing a suit after recoupment) which exposes a State to simplistic characterizations of its case as a suit for "money past-due" and "money damages."

The Secretary relies upon his recoupment of funds from future payments to support his novel argument on

jurisdiction, yet the Secretary concedes that the district court would have jurisdiction over an action which sought review of his decision but granted only "prospective" relief. Sec. Br. at 15 n. 1. If this is so, then jurisdiction would turn upon the outcome of each State's request for preliminary relief, because if such relief were obtained, no request for money "past-due" would be present. There is no evidence whatsoever that Congress intended such an uncertain basis for jurisdiction.

The court below determined that the term "money damages" in § 702 should be read "to mean any monetary relief, whether it is in the nature of damages or in the nature of specific relief." Commonwealth of Mass. v. Departmental Grant Appeals Board, 815 F.2d at 783;

see Pet. App. 5a-6a. That conclusion is not consistent with the evidence that Congress intended to authorize grant program litigation in the district court, but it is also beside the present point which is that the district court could (and did) grant complete relief by reversing the agency's decision and remanding the matter.[14/]

14/ Maryland Department of Human Resources v. HHS, 763 F. 2d 1441, 1446 (D.C. Cir. 1985), reached the result we seek here by distinguishing an action for "money damages" from one for "specific relief." The Secretary's brief assumes the considerable burden of examining and undermining the Maryland distinction. As demonstrated above, however, this case seeks neither "money damages" nor "monetary relief," and the district court satisfactorily resolved the dispute by reversing the Board's decision. Therefore, the Court need not adopt the reasoning of Maryland to reject the Secretary's characterization that this action is a suit for "money damages."

In sum, this is not a case for "money damages" beyond the jurisdiction of the district courts.

3. The Tucker Act Does Not Create an "Adequate Remedy" in the Claims Court that Bars District Court Review.

The waiver of sovereign immunity contained in section 702 includes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. The Secretary argues that a disallowance is unreviewable in the district court because the Tucker Act provides an "adequate remedy" in the Claims Court. Sec. Br. at 43-44. The Secretary assumes, for the sake of his argument, that the Commonwealth's action is not one

for "money damages." Sec. Br. at 11. But if the Commonwealth's action is not one for "money damages," it follows (as we argue in Point II, below) that an action for judicial revew of a disallowance is not within the jurisdiction of the Claims Court under the Tucker Act. If this is so, then the Secretary's argument that an action under the Tucker Act is "adequate" fails a fortiori. However, even if Congress conferred jurisdiction on the Claims Court over such "non-monetary" claims, we argue below that jurisdiction does not preclude district court jurisdiction under the APA because, by the Secretary's own admission, the remedies

in the Claims Court are not "adequate."15/

The relevant provision in section 704 was primarily "intended . . . to codify the existing law concerning ripeness and exhaustion of remedies," (Mass. v. Dept. Grant Appeals Board, 815 F.2d 778, 784 (1st Cir. 1987)), by ensuring that pre-enforcement review would not be available if "subsequent review in enforcement proceedings is 'adequate.'" Administrative Procedure Act: Legislative History, S. Doc. 248, 79th Cong. 2d Sess. 38 (1946). Thus the Secretary is reading a limitation in the waiver in section 702 where none exists,

15/ Indeed, in conceding that the Commonwealth could litigate in the district court if it waived the federal share of past expenditures, the Secretary acknowledges that an award of money is not an adequate remedy in an ongoing grant program.

or was intended. At the least, he is urging on the Court an overly broad reading of the purported limitation.

Even if section 704 imposes the limitation urged by the Secretary, it would not apply in this case, because the remedy in the Claims Court is not "adequate." The Tucker Act remedy in the Claims Court is inadequate because the Claims Court has no authority to provide the injunctive and declaratory relief available in the district court and often necessary to complete relief in a disallowance case.16/ "The

16/ The Claims Court is an Article I court, created by the Federal Courts Improvement Act (FCIA) of 1982, Pub. L. No. 97-164, 96 Stat. 25. The jurisdiction of the Claims Court includes the trial jurisdiction of the "United States Court of Claims," which was abolished by the FCIA. The decisions of the Claims Court are appealable under 28 U.S.C. § 1295(a)(3), to the United States Court of Appeals of the Federal Circuit.

Claims Court or district court exercising Tucker Act jurisdiction ordinarily lacks the authority to grant specific performance of contracts as well as other forms of equitable relief." Spectrum Leasing Corp. v. United States, 764 F.2d at 895 n. 7 (citation omitted). Only "in limited circumstances the Claims Court when exercising Tucker Act jurisdiction may be empowered to grant such equitable relief where the relief sought is in the form of money." Id. at 895 n. 7. In fact, prior to 1972, the Claims Court's predecessor (the Court of Claims) had no power to enter any equitable relief. See, e.g., United States v. King, 395 U.S. 1 (1969); Richardson v. Morris, 409 U.S. 464 (1973)(per curiam). In 1972, the Tucker Act was amended to grant the

Court of Claims "the power to remand appropriate matters to any administrative or executive body or official with such directions as it may deem proper and just." Pub. L. No. 92-415, 86 Stat. 652 (1972) (amending 28 U.S.C. § 1491). The legislative history of this "remand provision" demonstrates that Congress intended that the remand power conferred on the Court of Claims was more limited than the equitable jurisdiction of the district courts.[17/] In fact, Congress limited the equitable power given the Court of Claims after the Department of Justice expressed its concern about

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17/ See S. 1704, 90th Cong., 2d Sess. (1968); S. Rep. 1465, 90th Cong., 2d Sess. 4 (1968); S. Rep. 92-1066, 92d Cong., 2d Sess. 2 (1972); H.R. 12392, 92d Cong., 2d Sess. (1972); H.R. Rep. 92-1023, 92d Cong., 2d Sess. 5 (1972).

giving that court authority "over a wide range of governmental activities" or authorizing persons to "claim all sorts of relief against any agency of the Government."[18/] The legislative history further shows that Congress intended the remand power to be exercised only in government contract disputes. See S. Rep. 92-1066 at 3; H.R. Rep. 92-1023 at 4.

Following the enactment of the "remand provision," this Court and the Court of Claims consistently held that the Tucker Act did not authorize permanent or preliminary injunctive relief, declaratory judgments, or writs of mandamus. E.g., Lee v. Thornton, 420

18/ Collateral Relief in the Court of Claims: Hearing on H.R. 12392 Before Subcomm. No. 2 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 114, 121, 123, 134, 127 (1972).

U.S. 139 (1975) (per curiam); Smith v. United States, 654 F.2d 50, 53 (Ct. Cl. 1981).[19/]

The limited remedies available in the Claims Court are particularly inadequate in grant-in-aid disputes. The Secretary concedes that "the remedial powers of the Claims Court . . . will be limited to the power to render a money judgment and the limited power of remand to the agency that is given by 28 U.S.C. § 1491(a)(2)[,]" and that the "court will not have the power to issue a declaratory judgment that the GAB has misconstrued the law, or to enjoin peti-

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19/ In the Federal Courts Improvement Act of 1982 (the "FCIA"), Congress for the first time gave the Claims Court authority to enter declaratory judgments, injunctions, and other equitable relief in certain contract cases. See Pub. L. No. 97-164, § 133, 96 Stat. 25, 40 (1982) (codified at 28 U.S.C. § 1491(a)(3)).

tioners henceforth to construe the law differently when dealing with respondent." Sec. Br. at 45 (footnote omitted). Since the Claims Court cannot enter declaratory or injunctive relief (Sec. Br. at 45), the States could be required to commence suit in the Claims Court for each disputed period. The Claims Court would also be barred from issuing preliminary injunctions to prevent irreparable harm to individual beneficiaries or to States concerned about the elimination of disputed services.[20/]

20/ The Secretary suggests that since such cases are "simply a dispute about a stream of money payments over time," the Claims Court can provide complete relief and provide a "statement of the law that will bind the federal government in future dealings with the plaintiff." Sec. Br. at 44. The Claims Court cannot however, provide "complete" relief. Furthermore, the Secretary's statement grossly minimizes the important services at stake and ignores the limited resources of beneficiaries and States to repeatedly litigate in the Claims Court.

In sum, the language and legislative history of the APA and the Tucker Act demonstrate that the remedies available in the Claims Court are not "adequate" remedies which would bar district court review of grant disallowances under the APA.

C. The Social Security Act and the Federal Courts Improvement Act Support District Court Review of Grant Disallowances.

The jurisdiction of the district court over this case also is supported by considering the "entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Feres v. United States, 340 U.S. 135, 139, (1950).

The Secretary does not address the overall statutory context of this case. His narrow focus fails to take into account related legislative enactments and their histories, and ignores the anomalous consequences of his position. The Social Security Act (SSA) and Federal Courts Improvement Act of 1982 (FCIA) demonstrate long-term and prevailing Congressional intent to (1) vest power to review agency action under Title XIX and other titles of the Social Security Act in the district courts and the regional courts of appeals, and (2) limit the creation and jurisdiction of "specialized" courts, particularly those created by the FCIA.

1. The Social Security Act is one of the most complex statutes Congress has ever enacted. See Schweiker v. Gray

Panthers, 453 U.S. 34, 43 (1981). Pursuant to the Act, federal agencies have promulgated extensive regulations which set forth detailed policies and requirements for the programs covered by the Act.

The Social Security Act has a breadth of social impact that is equal to the depth of its terms. The Medicaid program is the largest of several cooperative federal-state programs operated under the authority of the Social Security Act to provide medical, financial, and other assistance to needy citizens. Programs under the Act include: Medicaid (Title XIX), social services (Title XX), and aid to families with dependent children (AFDC)(Title IV). Non-grant programs created by the Act include Social Security and Medicare.

The district courts and regional courts of appeals have substantial expe-rience deciding cases involving grant-in-aid programs under by the Social Security Act. This judicial experience has developed because Congress has often explicitly provided for judicial review of agency action under the Social Security Act in those courts. E.g., 42 U.S.C. § 405(g)(Social Security disability cases reviewable in district court); 42 U.S.C. § 1395oo(f) (district court review of certain actions brought by Medicare providers).

In the Medicaid Act itself, Congress has specifically authorized review in the court of appeals for "compliance" questions closely related (and sometimes nearly identical) to those raised in Medicaid disallowance disputes. Under 42 U.S.C. § 1396c, the Secretary may

review state plans, and amendments thereto, to determine whether they comply with the Medicaid Act. The "state plans" submitted to the Secretary under the Medicaid program contain lengthy and detailed descriptions of services provided under that program. If the Secretary rules that a plan does not comply with the Act, he may terminate federal Medicaid grants in whole or in part. Id. The Secretary's decision on a "compliance" matter is subject to judicial review in the court of appeals in which the State is located. 42 U.S.C. § 1316(a)(3); State of Ohio v. Dept. of HHS, 761 F. 2d 1187 (6th Cir. 1985).[21/] Past litigation in the

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21/ Under the Secretary's regulations, amendments to a state plan are subject to his approval, but effective on the date indicated by the state. 45 C.F.R.

(footnote continued)

courts of appeal demonstrate that a question of law or policy can often form the basis for either a disallowance or compliance dispute. E.g., Massachusetts v. Grant Appeals Board, 698 F. 2d 22 (1st. Cir. 1983). The court of appeals noted in this case that disallowances are used by the Secretary "to implement important policies governing ongoing programs." Pet. App. 4a. Given the fact that Congress expressly authorized court of appeals review for such closely related questions arising under the Medicaid Act, it is inconceivable that

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(footnote continued)

§ 210.3(g)(1987). The regulations also provide for administrative and judicial review (in the court of appeals) of a disapproval of plan amendments. Id. at §§ 203.4 and 203.7. Most importantly, the regulations further provide that upon the reversal of a prior disapproval, the Secretary will "certify restitution forthwith in a lump sum of any funds incorrectly witheld on otherwise denied." Id. at 201.4.

Congress intended that challenges to disallowances would be relegated to the Claims Court.[22/]

22/ The result sought by the Secretary would also be anomalous because it would remove from the district courts important issues of federal-state relations presented by grant-in-aid disputes. As a general proposition, this Court has required Congress to seasonably and unambiguously express federal conditions on the States' receipt of grants under the Medicaid and other programs. Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 25 (1978); see Bell v. New Jersey, 461 U.S. 773, 794 (1983)(White, J., concurring). Each time that the Secretary asserts his power to retrospectively interpret the Medicaid Act and to refuse to supply the federal share of reimbursement for past and future services, he imposes conditions which were not clear when the State's plan was approved or when it expended funds to purchase services for needy persons. The Secretary's view of jurisdiction thus imputes to Congress an intent to deprive the States of an Article III forum for the resolution of legal issues which effect millions of beneficiaries and implicate important issues of federalism.

Thus the result sought by the Secretary in this case conflicts with the terms and purposes of related portions of the Social Security Act and the Secretary's regulations. The Commonwealth's reading of the APA and the Tucker Act should be adopted by the Court because it is more consistent with the Act and avoids severe jurisdictional anomalies that Congress did not intend.

2. The jurisdiction of the district court over this case is also supported by the terms and legislative history of the Federal Courts Improvement Act of 1982 (FCIA), which created the Claims Court and defined the scope of its authority. In his brief the Secretary repeatedly asserts that Congress granted the Claims Court exclusive jurisdiction over the Commonwealth's case. It is

remarkable, then, that the Secretary nowhere discusses the legislative history of the FCIA, the act which he admits "created" the Claims Court as it currently exists. Sec. Br. at 14 n. 9.

The FCIA created the United States Claims Court and the United States Court of Appeals for the Federal Circuit. P.L. No. 97-164, 96 Stat. 25 (1982). The enactment of the FCIA followed a long and spirited debate over the reorganization of the federal courts and the creation of specialized courts.[23/]

23/ See H.R. Rep. 97-312, 97th Cong., 1st Sess. (1981); S. Rep. 97-275, 97th Cong., 1st Sess. (1981) at 1-8; Federal Courts Improvement Act of 1981: Hearings on S. 21 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1981).

The legislative debate and the committee reports reflect long-term and prevailing Congressional reluctance to create specialized courts to hear cases which have a wide impact on social policies. See, e.g., S. Rep. 97-275 at 39-41 (additional views of Senators Leahy and Baucus). If Congress believed in 1982 that the Court of Claims already had jurisdiction to review scores of types of agency decisions, including those made in grant-in-aid programs under the Social Security Act, the debate as to specialized courts would have been pointless. But in fact, Congress carefully limited the jurisdiction of the Claims Court and Federal Court, and refused to enact bills that would have expanded the jurisdiction of those courts or created specialized courts to hear cases involving the environment,

immigration, civil rights, aviation, and other "cases involving the interaction of laws and people." S. Rep. 97-275 at 39 (additional views of Senator Leahy).

The history of a predecessor bill to the FCIA confirms that through the creation of the Federal Circuit Congress intended to create "an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity[.]" S. Rep. 96-304 at 8 (proposed Federal Courts Improvement Act of 1979).[24/] The legislative history

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24/ "Among other things, the [FCIA] grants the Federal Circuit exclusive appellate jurisdiction over a variety of cases involving the Federal Government. 28 U.S.C. § 1295(a)(2)." United States v. Hohri, No. 86-510 (June 1, 1987),

(footnote continued)

of the FCIA nowhere mentions any case similar to this which Congress intended to remove from the then-existing caseload of the district and regional courts of appeal and transfer to the Claims Court and the Federal Circuit. This legislative silence in the FCIA is telling because at the time of the enactment of the FCIA, the federal courts had already held that the district courts had the authority to review disallowance decisions in grant-in-aid cases. See cases collected in Point I, B, supra. In construing statutes,

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(footnote continued)

slip. op. at 3. The 1981 Senate Report states that the Federal Circuit would "handle all patent appeals, plus government claims case[s] and all other appellate matters that are now considered by the [Court of Customs and Patent Appeals] or the Court of Claims[.]" S. Rep. 97-275 at 6.

the Court assumes that the Congress which enacted the law in question was aware of previous judicial decisions construing then-existing statutes. See, e.g., Director, Office of Workers' Compensation v. Perin North River Associates •459 U.S. 297, 319-320 (1983). Moreover, Congressional intent as to judicial review may be "inferred from contemporaneous judicial construction . . . and the congressional acquiescence in it[.]" Block v. Community Nutrition Institute, 467 U.S. at 349, citing Ludecke v. Watkins, 335 U.S. 160 (1948). There is no indication in the legislative history of the FCIA that Congress wished to disturb the decisions which had already found district court jurisdiction over grant disputes.

To the contrary, it is reasonable to infer that Congress foresaw at least two serious effects of such a transfer of jurisdiction. First, Congress knew that programs under the Social Security Act primarily affect needy people who would most benefit from the convenience of litigating questions under the Act in their local federal courts. United States v. Hohri, supra, notes that district court jurisdiction grants the "right to bring suits in the districts where [plaintiffs] reside without subjecting them to the expense and annoyance of litigating in Washington." Id., slip op. at 1-2 n. 1. Congress was aware of the burden which would be imposed on the States and recipients of Medicaid and other benefits who would be forced to litigate in Washington. Yet

if the Secretary's position is adopted, virtually all disallowance disputes in federal grant-in-aid programs, as well as other actions arising under the SSA, will be channeled to Washington for litigation in the Claims Court and the Federal Circuit.[25/] There is no legislative evidence that Congress intended such a result.

Second, Congress was aware that the substantive issues presented by grant cases arising under the Social Security Act and similar statutes are far from routine questions of law. See Pet. App. 8a; Schweiker v. Gray Panthers, supra. In fact, by 1982, the district courts

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25/ In fact, the Secretary has already taken the position that the Claims Court has exclusive jurisdiction over a suit by recipients against a state in which the state files a third-party complaint against the Secretary. See Grimesy v. McMahon, No. 87-1228 (pending in the Federal Circuit).

and regional courts of appeals had developed substantial experience in these areas.[26/] In the absence of a clear indication in the FCIA that Congress intended to extinguish the jurisdiction of these courts, and to confer it on the two newly-created, specialized courts, the Court should reject the Secretary's latest construction of the APA and the Tucker Act.

26/ Indeed, the resolution of the merits of this case required reference to both the Social Security Act and the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. (EHCA). At the time of enactment of the FCIA, the district courts and the courts of appeal had acquired substantial experience with EHCA. See Burlington School Committee, supra; Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982).

II. THE TUCKER ACT DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION OF THIS CASE.

A. The Tucker Act Does Not Confer Jurisdiction On The Claims Court Over This Case.

The Secretary argues that if any aspect of the Commonwealth's case is within the jurisdiction of the Claims Court under the Tucker Act, then the district court lacks jurisdiction over the entire action, and the court of appeals erred in concluding that such a case could be "bifurcated." Sec. Br. at 36-46. However, this argument assumes that this case may be brought under the Tucker Act. The Secretary himself acknowledges that the issue of "claim-splitting" only arises if the case "includes a Tucker

Act claim. . . ." Sec. Br. at 11. If the Commonwealth's case is not within the Tucker Act, then the Tucker Act does not preclude the Commonwealth from relying upon § 702's waiver of sovereign immunity, and invoking the federal question jurisdiction of the district courts under 28 U.S.C. § 1331. See Maryland v. Dept. of HHS, 763 F. 2d at 1448, 1450 n. 5.

The Tucker Act provides in relevant part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases sounding in tort.

28 U.S.C. § 1491. This section waives the sovereign immunity of the federal government and defines the jurisdictional limits of the Claims Court relevant to this case. The Tucker Act, does not, however, "create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398 (1976). Thus a plaintiff invoking the jurisdiction of the Claims Court under the Tucker Act must assert a substantive right that derives from another source of law. Id. A "claim" cognizable under the Tucker Act "must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies on can fairly be interpreted as mandating compensation

by the Federal Government for the damage sustained." United States v. Mitchell, 463 U.S. 206, 216-217 (1983), citing United States v. King, 395 U.S. 1, 2-3 (1969), and United States v. Testan, 424 U.S. at 400.[27/]

The Secretary argues that the Medicaid Act "can fairly be interpreted (if respondent is right on the merits) as mandating compensation by the federal government for the 'damage' sustained (i.e., payment of the amount of reimbursement incorrectly witheld)." Sec. Br. at 17. This broad reading ignores the rule that in "determining

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27/ See Murray v. U.S., 817 F. 2d 1580, 1582-1583 (Fed. Cir. 1987); Hambsch v. United States, 12 Cl. Ct. 744, 749 (1987), citing Eastport S.S. Corp. v. United States, 372 F. 2d 1002, 1009 (Ct. Cl. 1967)(Claims Court cannot grant any relief absent a "mandate" for an "award of money damages").

the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit." United States v. Mitchell, 463 U.S. at 218. For the reasons set forth in Point I regarding the term "money damages" in the APA, Massachusetts does not seek "damages for the Government's past acts, the essence of a Tucker Act claim for monetary relief." United States v. Mottaz, 476 U.S. 834, 851 (1986) (citation omitted).[28/] Since the Secretary himself equates the term "money damages" in the

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28/ Cf. Maryland v. Dept. of HHS, 763 F. 2d at 1450 (action for review of Title XX disallowance not cognizable under Tucker Act because Title XX does not "mandate compensation" for damages sustained); Delaware Div. of Health v. U.S. Department of HHS, 665 F. Supp. at 1117 (action for judicial review of Medicaid disallowance not a "claim" against the United States under section 1491).

APA with Tucker Act jurisdiction, the Tucker Act does not apply to this case unless it can be characterized as a suit for "money damages" outside the APA.

Furthermore, the Secretary's argument relies upon a mischaracterization of Medicaid as a program in which the States "demand payment" under a statute that "requires the federal government to pay the grantee money. . . ." Sec. Br. at 17 n. 14. The Medicaid Act does not authorize "damage" awards. It is not even monetary in its purpose. The Act represents a Congressional statement of federal cooperation in the provision of important human services. See 42 U.S.C. § 1396; Harris v. McRae, 448 U.S. 297, 308 (1980). The Secretary has cast himself as a mere paymaster, rather than

as a partner in a joint effort to serve people in need. But the Secretary's latest incarnation cannot transform the federal share of reimbursement into "damages sustained" by a State.

B. Even if the Tucker Act Applies to Some Portion of this Case, It Does Not Deprive The District Court of Jurisdiction.

The district court had jurisdiction over this case. The court of appeals incorrectly concluded otherwise. However, even if, as that court hypothesized, the Tucker Act deprives the district court of jurisdiction over some aspect of the case, the Tucker Act does not entirely deprive the district court of jurisdiction. See Sec. Br. at 36-46.

The Secretary admits that if only funding for future services were at

issue (i.e., if the Commonwealth "foregoes. . . recovery" as to "prejudgment events"), the district court would have authority to grant "nonmonetary" relief. Sec. Br. at 15 n. 11. Given that concession, the Secretary cannot maintain that the result reached by the court of appeals is prohibited by statute, and his argument that the Claims Court should be found to have exclusive jurisdiction simply elevates the policy against claim-splitting above the presumption of district court jurisdiction, despite strong evidence of contrary legislative intent.

The Secretary also argues that if the Commonwealth's case is cognizable under the Tucker Act, then the APA does not apply because, under section 702(2),

the Tucker Act "impliedly forbids" the relief sought. Sec. Br. at 44-46. Thus the Secretary argues that even as to the vitally important questions of Medicaid coverage, a State may obtain reversal of a disallowance only in the Claims Court, because any action which follows a disallowance and does not waive relief as to past services is, at least in part, an action for a money judgment within the exclusive jurisdiction of the Claims Court.

The Secretary's argument overlooks the legislative history of section 702(2). The history shows that, as to the Court of Claims, the section was intended only to protect the jurisdiction of that court over government contracts disputes. See H.R. Rep. No. 94-1656 at 12-13. Even if a broader reading of

the APA is supportable, the Secretary's application of section 702(2) ignores the fact that, at the time of the enactment of the APA amendments of 1976, one circuit court of appeals had already held that Medicaid disallowances were reviewable in the district courts. See County of Alameda v. Weinberger, 520 F. 2d 344 (9th Cir. 1975). Thus the Secretary would impute to Congress in 1976 the view that the Tucker Act, at that time, forbade district court jurisdiction over grant disputes which had already been determined by a court of appeals.[29/]

29/ The Secretary's argument is also refuted by cases which have held that the district court does not lose jurisdiction over a claim for nonmonetary relief even if a judgment for such relief may form the basis for a later money judgment. See, e.g., Hahn v. United States, 757 F. 2d 581, 589 (3d Cir.

(footnote continued)

In sum, the Tucker Act does not "impliedly forbid" district court jurisdiction over this case, even if some portion of the case were cognizable under the Tucker Act. If "claim-splitting" were to result, it would be the inevitable and tolerable by-product of the interplay of the APA and the Tucker Act. Since the Secretary concedes that the district courts have jurisdiction to review disallowances in some circumstances, his concern for claim-splitting reduces to a policy concern best directed to Congress, not the Court.

(footnote continued)

1985). See also Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 71 n. 15 (1978).

CONCLUSION

The judgments of the court of appeals should be affirmed in part and reversed in part, and the cases should be remanded with instructions to reinstate the judgments of the district court.

Respectfully submitted,

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APPENDIX

5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be

entered against the United States; Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) Compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1295(a)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under section 1338(a) shall be governed by

sections 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive

department providing for internal revenue shall be governed by section 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Claims Court. . . .

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1346(a)

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not

sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. . . .

28 U.S.C. § 1491

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive

department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or

executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

42 U.S.C. § 1316

(a)(1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary

under section 304, 604, 804, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determinations as provided in section 2112 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, may, at the option of the

State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, VI, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such participation, the State shall be

entitled to and upon request shall receive a reconsideration of the disallowance.

42 U.S.C. § 1396c

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this title [42 U.S.C. §§ 1396a et seq.], finds --

(1) that the plan has been so changed that it no longer complies with the provisions of section 1902 [42 U.S.C. § 1396a]; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).